No. 2463:

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR:

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STATEMENT OF THE CASE:

This Writ of Error is brought by the Southern Pacific Company as Plaintiff in Error, *to reverse* a Judgment of the District Court of the United States for the District of Arizona rendered upon a *directed verdict* against the Southern Pacific Company, upon the *first six Counts* of the Complaint, and imposing penalties totalling $402, being $1. on Counts 1 and 2, of the Complaint, and $100. each

on Counts 3, 4, 5 and 6, for alleged violation by the Southern Pacific Company of Sections 2 and 3, of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by *limiting the hours of service of employees thereon*," Approved March 4, 1907 (34 Stat. L. p. 1415).

Sections 2 and 3 of this Act are as follows:—

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or *permit* any employé subject to this act to be or *remain on duty* for a longer period than sixteen *consecutive* hours, and whenever any such employé of such common carrier shall have been *continuously on duty* for sixteen hours he shall be *relieved* and not required or permitted again *to go on duty until* he has had at least *ten consecutive* hours *off* duty; and no such employé who has been on duty sixteen hours *in the aggregate* in any twenty-four-hour period shall be required or *permitted to continue* or again go on duty without having had at least *eight consecutive* hours off duty:

"Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jur-

> isdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this act shall *not apply in any case of* casualty or unavoidable accident or the act of God; *nor where the delay was the result of a cause not known* to the carrier or its officer or agent in charge of such employé *at the time said employé left a terminal, and which could not have been foreseen:*"

The Complaint contains *twelve* Counts, but the *only* Counts involved upon *this* Writ of Error are the *first six* (Tr. 1 to 7); the *Answer* to these *first six* Counts (Tr. 15-24) denies any violation of this Act; and sets up an Affirmative defense to the *last six* Counts, to which the Government *demurred;* the Court *overruled* the Government's *demurrer* to the *Affirmative defense* set out in the Answer of Plaintiff in Error to the *last six* Counts (the facts as affirmatively therein stated being conceded by the Government to be true), and the Government, Plaintiff in Error and the Court consenting, the

sole question on these *last six* Counts was treated as one of law, and the Court rendered judgment *for* the Defendant, and from the Judgment on these *last six* Counts the Government has taken a Writ of Error upon a *Separate Record* (No. 2443).

The particulars of the charge in these *first six* Counts involve the hours of service of a train crew consisting of the Conductor Sullivan, Engineer Eaker, Fireman Kempf and trainmen Brown, Peacock and Harrison, all of whom lived at Benson, (Tr. p. 44, p. 53), during the *run of regular local freight* train (Tr. p. 37 & p. 51) Extra West, Engine No. 2813, December 21, 1912, from Lordsburg to Benson (Tr. p. 31), placed on duty at Lordsburg at 5:30 A. M. and left at 6 A. M. December 21, 1912, with *Benson* as the *final destination* of (Tr. p. 51) that train; Engineer and Fireman finally relieved at Cochise, at 10:29 P. M.; train *arrived* at Benson and remainder of Crew were relieved at 12:40 A. M. December 22, 1912; time *on road* 15 hours, total time in service of Conductor and trainmen 19 hours and 10 minutes, and 16 hours and 59 minutes as to Engineer Eaker and Fireman Kempf (Tr. p. 1-3); *Schedule* time 10 hours; miles run 115 (Tr. p. 63-67).

The evidence on the trial (all introduced by the Government) shows *a break in service* of the Conductor and three brakemen, who, during this run from Lordsburg to Benson were relieved at *Bowie* at 9:15 A. M. until 11:40 A. M. (2 hours and 25

minutes), as it was *necessary* to use their Engine for other service and their train was on a siding (Tr. p. 32); Engineer and fireman with their Engine were *helping another train up the hill* from Simon to Steins (Tr. p. 39, and p. 40) and were released when they arrived at Bowie at 1:30 P. M. until 2:30 P. M. (p. 39); the train was pulled into Bowie by another Engine (p. 40), another engine crew relieved them at Cochise, and they dead-headed thence into Benson (p. 40, 41); and the Conductor and trainmen were *relieved again* at 1:20 P. M. until 2:20 P. M. (1 hour), a total period of relief from service of 3 hours and *25* minutes, while the time of *over service* was *only* 3 hours and *10* minutes; deducting these two periods of relief from duty, these members of the crew (Conductor and three trainmen) were thus on duty for a period *not exceeding sixteen* consecutive hours (Tr. p. 31-33), viz: 15 hours and 45 minutes; the *Engineer and Fireman* were on duty from 5:30 A. M. to 1:30 P. M. when they were *relieved* from duty *at Bowie* from 1:30 to 2:30 P. M. and were *finally* relieved at Cochise at 10:29 P. M., making the period of duty of Engineer and Fireman 15 hours and 59 minutes, a period of *less* than 16 consecutive hours (Tr. p. 33-34).

The evidence in the case, and all of this evidence introduced by the Government, is very clear that these men were *relieved* from duty *for a definite period* from 9:15 to 11:40 A. M. and *for a definite*

period from 1:20 to 2:20 P. M. (1:30 to 2:30 Engineer and fireman); that during that time they were not engaged in any way in the movement of the train or expected to or doing any work, they were free to do what they pleased, and did what they pleased, and as the evidence shows were actually resting. (Tr. p. 31-63).

The Court granted the Motion of the Government, and *directed a verdict* in favor of the Government upon these *first six* Counts (Tr. p. 59).

ASSIGNMENTS OF ERROR:

Plaintiff in Error relies upon the following Assignments of Error:—

1—.Assignment of Error "8" (Tr. p. 82); the Court struck out and excluded from the jury the testimony of the Conductor that he "*was off duty*" during the period testified to by him (Tr. p. 48); such testimony being a question of fact which should have been submitted to the jury.

2—.Assignment of Error "9" (Tr. p. 82, 83); the Court sustained the Government's objection to the question put to the Engineer (Tr. p. 56), whether he or his fireman was required or permitted to be or remain on duty for a longer period than 16 consecutive hours, to-wit:— from 5:30 A. M. until 10:29 P. M. on December 29, 1914, the same being a question of fact to be submitted to the Jury.

3—.Assignment of Error "13" (Tr. p. 88-91); the Court granted the Motion of the Government

that the Jury be directed to return a verdict in favor of the Government upon these *first six* Counts of the Complaint.

4—.Assignment of Error "14" (Tr. p. 91-93); the Court denied the Motion of Plaintiff in Error that the jury be directed to return a Verdict in favor of the Plaintiff in Error on these *first six* Counts of the complaint; and that the questions of fact should have been submitted to the jury for their Verdict.

5—.Assignment of Error "15" (Tr. p. 93); the Court granted the Motion of Defendant in Error and denied the Motion of the Plaintiff in Error, for a directed verdict upon these *first six* Counts; and that the case should have been submitted to the jury. (Tr. p. 95-96)

ARGUMENT

I

FIRST:—THE MEMBERS OF THIS TRAIN CREW WERE RELEASED FROM DUTY DURING A PERIOD OF THREE HOURS AND TWENTY-FIVE MINUTES, UNDER CIRCUMSTANCES WHICH BROKE THE CONTINUITY OF THE SERVICE WITHIN THE MEANING OF THIS ACT; THIS PERIOD OF RELEASE MUST BE DEDUCTED FROM THE ENTIRE TIME CONSUMED IN MAKING THE TRIP FROM LORDSBURG TO BENSON, VIZ: 19 HOURS AND 10 MINUTES, AND SO DEDUCTED LEAVES THE ACTUAL PERIOD OF SERVICE ONLY FIFTEEN HOURS AND 45 MINUTES.

The charge is simply one of the *overtime service* of this train crew of this local freight train running between Lordsburg and Benson, whose *homes* were in Benson, and who had been *released* from duty for the *definite* periods of *two* hours and 25 minutes and *one* hour, a total of *three* hours and 25 minutes during this run; there is *no* charge that this crew did not have the amount of legal rest, nor any charge that they again went on duty without sufficient previous rest, *nor* any charge of negligence or fault of any kind on the part of the company; nor is it claimed or even pretended by the Government that *any one* of this train crew was on duty or in any manner connected with the movement of this train or any other service of the Defendant during the time embraced in these two definite periods of release from duty.

THE EVIDENCE

The evidence in the case, all introduced by the Government, consists of the *undisputed* testimony of the *Conductor* and *Engineer*, testimony of the *Chief Dispatcher* at Tucson, and records of the Company relating to this train and its crew from terminal to terminal, Lordsburg to Benson (Tr. p. 30-59), is as follows:

Sullivan, the Conductor, testified (Tr. p. 47-53):—"We left Lordsburg at 6 A. M. arriving at Bowie at 9:15 A. M. Was *released at Bowie* at 9:15 to 11:40 A. M. two hours and twenty-five minutes; was *released* at Bowie at 1:20 P. M. *to go to*

work at 2:20 P. M. I was sitting around Bowie, sitting around reading during this time, and from 2.20 on I got my train together and got ready to leave town. The delay report shows a number of delays there. Delay by other trains. Letting passenger trains by, waiting for another engine five hours and fifteen minutes, taking water, lunch, blocked by other trains so we could not get out. We were blocked by these other trains after we went to work. We were blocked after we went to work, after 2:20 and were delayed from 2:20 P. M. to 6:00 P. M. by these various causes. I don't remember what prevented us from getting out at 1:30 when engine 2813 got back. I didn't know why the release from 1:20 P. M. to 2:20 P. M. was given us. The operator gave us the release. The *operator said you are released for one* hour. The operator did not say why. We could not have gotten out of the yard at 1:30 because we were blocked. The *operator also gave us the release of two hours and twenty-five minutes*, which was verbal. The *operator told me* I was *released until* 11:40 A. M. If I remember right, *he didn't say released until called;* he said released until 11:40 A. M. When the release was given us from 9:15 to 11:40 *they are supposed to call us after the time of the release and we are off until we are called.* From 9:15 to 11:40 I was around the hotel there reading and the brakemen were in the caboose and around the hotel and sitting under the trees. We were *released* that morning according to my train book

for that length of time. The train book shows released at Bowie at 9:15 A. M., called to go to work at 11:40 A. M. They called us at 11:40 A. M. *to go to work* as soon as we can *after* that. According to my train book *we went off duty* at 9:15 A. M. I didn't know when I was going to be called. I was not doing anything during the two hours and twenty-five minutes, only just staying round the hotel. *I didn't perform any duty for the company during that time. I knew when I was released at 9:15 that I would not have to go back to work until 11:40 A. M.*, and during that time I could do as I pleased. I could have gotten into an automobile and gone out in the country and got back at 11:40 and would have been in the clear and *so would the brakeman.* I had a right to go and come as I chose—*we were free. Our time was absolutely our own* from 9:15 a. m. until 11:40 A. M., and *that applied to the brakemen too.* From 1:20 P. M. to 2:20 P. M. we were *relieved for one hour.* We had to be *back after* that one hour, and *when we were relieved* at 1:20 *we knew we did not have to go back to work until* 2:20 P. M. We were *not waiting around expecting to go to work* during that period. Our *time was absolutely our own* during that time. That applied to the brakemen too, *and we do as we like. We were free to come and go as long as we were back at 2:20, and we were not working for the company during that time and neither were the brakemen.* Our regular engine was used to help a train from Simon to Steins. I think it is about

thirty miles from Steins to Bowie. Mr. Eaker and Mr. Kempf were running that engine. I knew that we could not go out until that engine came back. I think that engine got back at 1:20 P. M. and that is when they released us again. This train which I had was the regular local between Lordsburg and Benson. The regular run was from Lordsburg to Benson and *the termini* for that train were Lordsburg and Benson. When we left Lordsburg we expected to go to Benson that day. Mr. Kempf and Mr. Eaker, the engineer and fireman, didn't go all the way through. They stopped at Cochise at 10:29 P. M. because their sixteen hours was up. We (the train crew) had plenty of time to go on to Benson and we had got another engineer and fireman at Cochise. They came from Benson. *The company did not have any extra engineers and firemen at Cochise*—had to send them out from Benson. They used the same engine to pull the train into Benson. We were delayed at Bowie 5 hours and 15 minutes waiting for the Engine, 25 minutes for No. 9, 10 minutes for No. 10, 2 hours switching, 40 minutes blocked by No. 32, 30 minutes by Extra 2759, and 20 minutes blocked by passenger train.

"*When this release was given* at 9:15 *it stated that we were to be off duty until* 11:40. Until our engine got back. We could not tell how long we would be off. I was figuring we could get in was the reason I didn't send the message to the dispatcher until after we left Bowie. The reason I

didn't wire him at Bowie is because the Dispatcher knew we was off at Bowie. We generally called his attention to it. It was not necessary to wire the dispatcher from Bowie. I had no occasion to wire the dispatcher from Bowie. I did not receive any message at Bowie that I was released; the operator told me. I would be off duty till called.

"(Witness reads from train book at the request of Counsel for plaintiff:) "Released 9:15 A. M., called to work 11:40 A. M., released 1:20 to go to work at 2:20."

"*When we were released at* 9:15 *to go to work at* 11:40 *it is the custom to call us at 11:40 whether release is for a definite or indefinite period.*

"I stated I was released at Bowie at 9:15 and called to go to work at 11:40. I am referring to my train book which states that the release—that I was released at 9:15 and called to go to work at 11:40. My understanding was that I was *released until* 11:40. I was released at 9:15 until 11:40. The *operator said that to me when he released me.*

My home at that time was at Benson as well as the other members of the train crew, also the engineer and fireman.

"There is a hotel at Bowie, a store, restaurant, reading-room, newsstand and billiard-room. There is a hotel at the depot where we can get sleeping accommodations.

EAKER, the Engineer, testified (Tr. p. 53-56):

"In December, 1912, I was running on the Southern Pacific on the Benson to Lordsburg local. I was the engineer on Extra West, Engine 2813, on December 21, 1912.

"Referring to this time slip I came out of Lordsburg on this trip on engine 2813 to San Simon, from San Simon back to Stein's and ran light from Steins to Bowie. I got back to Bowie at 1:20 P. M. When I got back I ate dinner and purchased a cigar and smoked and then went out on the platform and went to sleep. Myself and my fireman ate dinner as soon as we got back. There *was a release given us.* I don't remember who gave it to us. I don't think he said anything to me. *He gave me a message releasing the engineer and fireman for at least one hour.* Someone came out on the platform and waked me up and told me we were going to work at 2:30 and we went back to our engine. From that time on we were switching in the yard at Bowie for a number of hours and we were released at 10:29 P. M. at Cochise. Mr. Kempf was my fireman during this time.

"Myself and Mr. Kempf left Lordsburg with our engine on that train and arrived at Bowie at 1:20 P. M. We stopped with the engine before we got to Bowie at San Simon. Our engine was the regular engine for that train. We were supposed to take that train clear through to Benson with that

engine. When we got into Bowie at 1:30 *we received this message relieving us for one hour* and when we received this message *we knew that we would not have to go to work until that hour expired.* During that time we were not expected to go to work. *We could do what we pleased during that hour and we did do what we pleased. The hour was absolutely ours and we were not to perform any duty for the company during that time.* I ate lunch, smoked a cigar and laid down and took a nap and got rested and someone woke me up and we went and got on our engine and went to work, switched around the yard awhile and then went to Benson. Our time was up at Cochise at 10:30 P. M., and we were relieved there at Cochise at 10:29 P. M. We quit work right there at Cochise and did not work any longer on that trip. Another engineer and fireman, Engineer Wilson and Fireman Houston, deadheaded out from Benson to Cochise and relieved us at Cochise. They were on our engine ten or fifteen minutes before our time was up waiting to relieve me. They got on our engine ten or fifteen minutes before our time was up. At 10:29 I climbed down off the engine and went back to the caboose of the train and went to bed and deadheaded on that train into Benson, and the fireman also. Neither of us worked any more after 10:29 on that trip."

WILLIAM WILSON, Chief Dispatcher at Tucson, testified (Tr. p. 30-47):

"I have been chief dispatcher at Tuscon for six years. My duties as dispatcher are to keep a record of train and engine men, as to the time that they are called and the time that they are released or go off duty, fill orders for cars, keep a record of the engines and cars, see that passenger and freight trains make time and in general everything pertaining to the hours of service of train men and engine men. In December, 1912, the trains between Lordsburg and Benson were in my jurisdiction. (Witness here identifies train sheet handed him by counsel for plaintiff.) This train sheet shows the train number, crews of the trains, conductors, engineers, firemen, engine number the *time they were called and relieved at different points.* This train sheet was started at 12:01 A. M. and all trains starting on their run at or after 12:01 A. M. are kept on this sheet until they have finished their run. This train sheet is made by the train dispatcher who is under my jurisdiction and under my orders. This is an official record of the company. (Witness identifies another train sheet handed him by counsel for plaintiff.) This train sheet shows train extra, engine No. 2813, December 21st, 1912, which was *a local freight train running between Lordsburg and Benson.* The employees on that train were called to leave on the morning of December 21st, 1912, for six A. M., which placed them on duty at 5:30 A. M. Mr. B. F. Eaker, Mr. Frank H. Kempf, Mr. B. T. Sullivan, Mr. W. E. Brown, Mr. H. F. Peacock and Mr. C. G. Harrison were the employees

engaged in connection with the movement of this train. They had orders to take that train to Bowie when they reported at 5:30 A. M. When they started with that train from Lordsburg their objective point was Benson. *Benson* was the *final* destination of the train.. It arrived at Benson at 12:25 A. M. December 22d, 1912. Only a part of these employees were still engaged in and connected with the movement of this train when it arrived at Benson, Conductor Sullivan and Brakemen Brown, Peacock and Harrison, and they were *released from all service* in connection with that train on December 22d, at 12:40 A. M. This train sheet does not show that they were in continuous service from the time they reported at Lordsburg until they were relieved at 12:40 A. M. December 22d. It shows *a break in the service* with respect to the conductor and the three brakemen. It shows that *they were relieved at Bowie* at 9:15 A. M. until 11:40 A. M. and *again* at 1:20 P. M. until 2:20 P. M. and the balance of the time outside of these two releases they were in continuous service. The purpose of the first release at Bowie from 9:15 A. M. to 11:40 A. M. two hours and twenty-five minutes, was that it was necessary to use their engine for other service and their train was on the siding at Bowie, so far as I could say. This release was sent to the men by a message to the agent at Bowie. The agent is supposed to have delivered the message, he is the one in charge of that. We kept this message in the office of the chief dispatcher. (Witness here

identified copy of message handed to him by counsel for the plaintiff, which document was thereupon offered in evidence by plaintiff, admitted and marked Government's Exhibit "A", and which is hereinafter fully set forth.) This message was signed by dispatcher Glenn. He was on duty at that time. "W. H. L." referred to in this message is W. H. Lawrence, Agent at Bowie, and the initials "W. W." are my initials. The notation on the train sheet that these employees were relieved from 9:15 to 11:40 was made from the message received from the conductor. That notation was made by dispatcher Glenn, who was on duty at that time from eight in the morning until four in the afternoon. I have a copy of the message signed by the conductor to the dispatcher. (Witness here identifies copy of message handed him by counsel for plaintiff, which was offered in evidence by the plaintiff, and admitted and marked Government's Exhibit "B", and which is hereinafter fully set forth.) The letters "Bo." on this message is the call for Bowie, and it shows that it was received at 1:58 P. M. by "G."—by Mr. Glenn. I don't know what character of release was given to the conductor and brakemen at Bowie. There was a *message sent* to the conductor at Bowie, *relieving* the conductor and brakeman *from* 1:20 P. M. *to* 2:20 P. M. but no copy of this message was retained. I could not at this time say positively what the purpose of that release was. I did not make any report that this hour was allowed them for dinner. The *engineer and fireman*

of this train were *finally relieved* at 10:29 P. M. December 21, 1912, at Cochise.

"The *engineer and fireman* of this train, B. F. Eaker and Frank H. Kempf, were *released at Bowie at* 1:30 P. M. *to* 2:30 P. M. The record does not show for what purpose. Outside of that one hour for which they were released at Bowie, they were in continuous service from 5:30 A. M. to 10:20 P. M. That release to the engineer and fireman was sent over the wire in the form of a message, I could not say to whom it was addressed, but it was sent by some one in the office of the Chief Dispatcher—Mr. Glenn—I know I told the dispatcher, Mr. Glenn to send it. The notation here on the train sheet of the engineer and fireman being relieved one hour at Bowie, from 1:30 to 2:30 P. M., is made in the handwriting of Patrick Flynn, a dispatcher who came on duty at four P. M.

"This is the train sheet showing train extra west—shows the number of the train, the number of the engine on the train, the conductor's name—it shows that the train was called to leave Lordsburg at 6:00 A. M., and shows the time it arrived at Bowie, and the time they were relieved and went on duty again at Bowie, the time the engine crew was released at Cochise and the time the train crew was released at Benson. *The trainmen and the enginemen are directly under me as to when they shall leave a terminal and when they shall be relieved.*"

"The regular run of this train referred to Extra West, Engine No. 2813, December 21, 1912, was from Lordsburg to Benson. It was a local freight train.

"When this train reached *Bowie the conductor and three brakemen were relieved from duty from* 9:15 A. M. *until* 11:40 A. M. From the time that they went on duty at 5:30 A. M. at Lordsburg, until they were relieved at Bowie, at 9:15 A. M., is three hours and forty-five minutes, and they were *relieved from* 9:15 A. M. *to* 11:40 A. M., two hours and forty-five minutes. During the time that they were relieved, two hours and twenty-five minutes, they were in the town of Bowie. *From* 1:20 P. M. *to* 2:20 P. M. they were *also relieved at Bowie* one hour. They were at Bowie altogether five hours and five minutes. They reported at 2:20 P. M. to go to work and worked from 2:20 P. M. to 12:40 A. M., December 22, 1912.

"From 5:30 A. M., when the men were considered on duty at Lordsburg, until they were finally relieved, counting out the two hours and twenty-five minutes and the one hour's time they were relieved at Bowie, would be fifteen hours and forty-five minutes, and in that fifteen hours and forty-five minutes is included the time that they were on duty at Bowie from 11:40 to 1:20 P. M., one hour and forty minutes.

"*I issued instructions* that the train crew be *released from* 9:15 A. M. *to* 11:40 A. M. *and from*

1:20 P. M. *to* 2:20 P. M., and *I issued instructions* that the engine crew be *released from* 1:30 P. M. *to* 2:30 P. M. that I may use that time to get them as near to Benson as possible; that I may consider the period they were released as being off duty. Mr. Eaker's engine did not bring the train into Bowie. *Mr. Eaker with his regular engine was helping another train* from San Simon to Steins, and returned from Steins to Bowie arriving at Bowie at 1:30 P. M., and was *released from* 1:30 P. M. *to* 2:30 P. M., one hour. When *Mr. Eaker and his fireman* arrived at Bowie at 1:30 *he was released.* He was *not required to perform any duty* for the company *from* that time *until* two-thirty P. M. When the *train crew was released at* 9:15 A. M. *until* 11:40 A. M., at Bowie, they were *not required to perform any duty whatever* for the company during the two hours and twenty-five minutes. They were *not required to do anything for the company* either during all the time from 11:40 to 1:20 P. M., while they were on duty. They were not required to do anything for the company from 1:20 P. M. to 2:20 P. M. *They could go and come and do as they chose. Their time was their own. They were not waiting around expecting to be called and to go on duty during the periods of time they were released.* That applied to both periods as to the train crew, from 9:15 A. M. to 11:40 A. M., and from 1:20 P. M. to 2:20 P. M. When this train reached Simon Mr. Eaker and Mr. Kempf took their engine and turned around and went

back to Steins helping another train up the hill. They then came back to Bowie and caught up with their train there. The train was pulled in from Simon to Bowie by another engine. When Mr. Eaker and Mr. Kempf got back to Bowie with their regular engine they took the train with it. I stopped Mr. Eaker and Mr. Kempf before they got to the end of their run on account of the sixteen hour law and relieved them at 10:29 P. M., at Cochise Station. Cochise is not a terminal and was not the terminal for that train and was not the end of the run for that train. I relieved them at that place at 10:29 P. M. to comply with the sixteen hour law and to keep them from working longer than sixteen consecutive hours. In order to get the train into Benson to the end of this run it was necessary to deadhead another engine crew from Benson to Cochise, to relieve Engineer Eaker and Fireman Kempf. Neither Mr. Eaker nor Mr. Kempf performed any duty whatever for the company after 10:29 P. M. that night. They deadheaded from Cochise into Benson. I have been to Bowie. They were relieved at Bowie and remained there and could have obtained food and rest and recreation, at least I have gotten them there myself.

"The engineer and fireman were *not relieved* by me from 1:30 P. M. to 2:30 P. M. *to eat.* My instructions were not to that effect. Neither were the conductor and brakemen relieved for that purpose.

"The *release* of one hour was *not* given to the engine crew and train crew for the purpose of allowing them *to eat.* It was given for the purpose so it could be used as being off duty and working them to get them nearer to Benson. I cannot state now what the conditions were in the yard at Bowie or in the roundhouse as to necessitate giving that release of one hour. I could not refer to any records which I have to ascertain that information. The agent at Bowie possibly would have such records. I sent these release messages or authorized the messages sent. So far as I can recall *it was on account of conditions.* It was not known exactly when we could get them out. *The train did not leave Bowie until six P. M.* They were there switching around and meeting other trains. The reason the first release was given to the train crew for two hours and twenty-five minutes was, at that time it looked as though the engine would be back to Bowie and start work about 11:40. The message was addressed to the roundhouse foreman and to the agent at Bowie. That message did not tell them any definite period to release the crew. It simply said, "Release them." I don't know just what the conditions were to make the release just 2 hours and 25 minutes, from 9:15 to 11:40 A. M. these men were not under any responsibility at all. I don't know where they went or what they did, only they must have remained at Bowie. If the release was definite from 9:15 A. M. to 11:40 A. M., they would report again at 11:40 A. M. without being called.

From 11:40 until the next release went into effect the men were still at Bowie under instructions from me, but they were not working. I could not say whether or not they reported at 11:40 A. M. *When the train is in the yard limits the agent has charge of matters of that kind.* There is also a company watchman to look after the train. If the men were not released for a definite period and had to be called to go on duty again the agent would have the yard clerk call them. He would simply have to hunt them. There is no way for them to get out of town; they would have to stay in Bowie. They didn't know when they were released how long they would be at Bowie. At the time the last release of the whole train crew for one hour a local freight train going east arrived at Bowie at 2:15 P. M. They (the train crew released) couldn't have gotten out; they would have to stay there to meet every train so far as that train was concerned. They did all their work switching in the yard after 2:30 P. M. I can't say why they did not do it between 1:20 and 2:20; possibly the engine might not have been ready. When their engine got in there to Bowie, as a rule they took oil and water and sometimes the roundhouse foreman will do a small job on the engine, but in this case I can't say what work there was to do on the engine. The local crews and probably other train crews on the slow train had lunch at Bowie and also at one or two other places, but I cannot say whether these men had their lunch there at that time. Sometime the

men carry their lunches with them in the caboose. In this case I would say that *these men lived in Benson.* If conditions had been normal at Bowie at that time this release would not have been given. The release was given to cover the delays which we saw would be encountered there at Bowie. They had a lot of switching to do.

"The engine crew which was deadheaded from Benson to Cochise took this same engine at Cochise. As well as I remember they went over on passenger train No. 8. Ordinarily that train arrived at Cochise, at 10:15 P. M. I don't know what time Extra West, Engine 2813, passed Cochise because the office at that place was closed at night. It is the duty of the train dispatcher when he gives a release to note the same on the train sheet when he gets a message from the parties who have been released. He writes it on the train sheet when he gets a message from them. We always try to get a message from them for the record. If I had wanted these men at Bowie to go to work before the two hours and twenty-five minutes was up I would have instructed the agent to call them. There is an address book of all trains and engine-men at Tucson and at all other places where they go off duty. When they are wanted they are called provided they have had their rest. At other places ordinarily they are in the caboose. There was no address book at Bowie. In case they were wanted it would have been necessary to send out and notify them. *I could not have cancelled that release until I had*

gotten the word to the men. If I had found we wanted them at ten o'clock I had a right to call them, but I didn't need them.

"EXAMINATION BY THE COURT.

"I cannot state just what the cause of the delay was at that time at Bowie, but Bowie is quite an important interchange point, especially in the winter time, and becomes congested; that is, a great many trains pass through there and there may be not enough engines to handle them, and the helper engine may have other work so that we would have to take one of these crews to handle some freight train. As well as I remember, it was owing to the *condition of the yards and the weather* that required the trains to stay there so long. The only records we have is the delay reports.

"*During* the two hours and twenty-five minutes this train crew was *relieved at Bowie from* 9:15 A. M. *to* 11:40 A. M., *they were not waiting around expecting to be called or to have the release changed on them.* In case it had become necessary for any good reason and occasion demanded it to have changed the period of release and we had called these men to go to work before 11:40 A. M., I would have had to issue instructions to the agent as to what time I wanted them and he would have endeavored to get them, and if he had not been able to get them started to work at the time specified he would then have advised me. If the agent could not have found the men the call would have had

to have been changed and the men would have been subject to no reprimand on that account. *They had a right to go out into the country if they wanted to, as long as they showed up at* 11:40 A. M., *and I had no right to change the time of the release on them* unless I could get hold of them."

These *two* periods, viz:—from 9:15 to 11:40 A. M. 2 hours and 25 minutes, during which the *Conductor* and *three* trainmen were *relieved* from duty at Bowie, for this *definite* period of time, should upon a fair, legal construction of Sections 2 and 3 of this Act, be deducted from the period of actual service of these members of that train crew; and as the total period between 5:30 A. M. when they went on duty and 12:40 when they were *finally relieved* from duty at their destination terminal—Benson, was 19 hours and 10 minutes, such deduction would reduce that period to 16 hours and 45 minutes; they were *again relieved* at 1:20 to 2:20 P. M. for a definite 1 hour, thus further reducing the period charged by the Government to 15 hours and 45 minutes, and making the *aggregate* of their service *less* than the permitted 16 consecutive hours.

The Engineer and Fireman were relieved at Bowie for the definite period of 1 hour, from 1:30 to 2:30 P. M., and were *finally relieved* from duty at Cochise, at 10:29; so that, as the Engineer and Fireman went on duty at Lordsburg at 5:30 A. M.

and were finally relieved at Cochise at 10:29, and this 1 hour release should be deducted, their period of service was only 15 hours and 59 minutes.

The Government does not charge nor is there any claim that any of this train crew went again on duty without having had the required period of previous rest; the charge is simply one of *over-service*, 19 hours and 10 minutes as to the Conductor and three trainmen, and 16 hours and 59 minutes as to the Engineer and Fireman; while the Plaintiff in Error claims and proved a release from duty for the definite period of 3 hours and 25 minutes as to the Conductor and three trainmen, and 1 hour as to the Engineer and Fireman, making the *aggregate* period of service of the *whole* crew *less* than the 16 hours allowed by law.

In United States vs. Atchison T. & S. F. R. Co., 220 U. S. 37, 43-44, 55 L. Ed. 361, 363, Justice *Holmes* rendering the Opinion, the Supreme Court (affirming 177 Fed. 114) said (Italics ours) :—

> "The case is this: By sec. 2 it is made unlawful for common carriers subject to the act to permit any employee subject to the act to be *on duty* 'for a longer period than *sixteen consecutive* hours' or, after that period, to go on duty again until he has had at least *ten consecutive* hours *off* duty, or *eight* hours *after sixteen hours' work in the aggregate:* Provided that no telegraph operator and the like shall be permitted to be 'on duty for a longer period than nine hours in any twenty-four hour

period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime,' with immaterial exceptions. By sec. 3 there is a penalty of not exceeding $500 for each violation of sec. 2. The defendant was subject to the act. It had a station and telegraph office, at Corwith, in the outer limits of Chicago, which was shut from 12 to 3 by day and by night, but open the rest of the time. The government contends that this was a place 'continuously operated night and day.' At this station the same telegraph operator was employed from half past 6 o'clock in the morning until 12, and again from 3 P. M. to half-past 6, or nine hours, in all, of actual work. *The government contends that when nine hours have passed from the moment of beginning work, the statute allows no more labor within twenty-four hours from the same time, even though the nine hours have not all of them been spent in work.* According to the government's argument, the operator's nine hours expired at half-past 3 in the afternoon. These questions on the construction of the statute are the only ones that we have to decide.

"*We are of opinion that the government's argument can not be sustained*, even if it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting. The antithesis is between places continuously operated night and day and places operated only during the daytime. We think that the government is right

in saying that the proviso is meant to deal with all offices, and if so, we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head. A *trifling interruption* would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.

"But if we concede the government's first proposition, it is impossible to extract the requirement of fifteen hours' continuous leisure from the words of the statute by grammatical construction alone. The proviso does not say nine 'consecutive' hours, as was said in the earlier part of the section, and if it had said so, or even 'for a longer period than a period of nine consecutive hours', still the defendant's conduct would not have contravened the literal meaning of the words. *A man employed for six hours and then, after an interval for three,* in the same twenty-four, *is not employed for a longer period than nine consecutive hours. Indeed, the word 'consecutive' was struck out* when the bill was under discussion, on the suggestion that otherwise a man might be worked for a second nine hours after an interval of half an hour. In order to bring about the effect contended for it would have been necessary to add, as the section does add in the earlier part, a provision for the required number of consecutive hours off duty. The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied.

"The government suggests that if it is not implied, a man might be set to work for two hours on and two hours off, alternately. This hardly is a practical suggestion. We see no reason to suppose that Congress meant more than it said. On the contrary, the reason for striking out the word 'consecutive" in the proviso given, as we have mentioned, when the bill was under discussion, and the alternative reference in sec. 2 to 'sixteen *consecutive* hours' and 'sixteen hours *in the aggregate*', *show that the obvious possibility of two periods of service in the same twenty-four hours was before the mind of Congress*, and that there was no oversight in the choice of words.

Judgment of Circuit Court of Appeals affirmed."

This Case—Atchison T. & S. F. Ry. Co. vs. U. S. 177 Fed. 114, was decided by the Circuit Court of Appeals for the Seventh Circuit, Circuit Judge *Grosscup* rendering the opinion, which is *affirmed* by the *Supreme* Court in the 220 U. S. 37, quoted above; on pages 118, 119, the Opinion states:—

"The contention of the Government is, that while in neither of the cases above mentioned was the operator required or permitted to remain on duty for more than nine hours in any twenty-four in the aggregate, such service, within the contemplation of the statute either is to be divided into 'two periods', separated by the intermission (for which the statute makes no provision), or is to be considered as 'one period', including the intermission, which

would make it a period of twelve hours. But manifestly, Congress did not intend that an intermission of three hours, in the middle of the day, should be computed as a part of the employee's service; for *the statute was enacted in view of the customs of the land*, and the customs of the land do not include such intermissions as a part of the working hours of employees. The position of the Government is therefore reduced to its contention respecting the word 'period',—that 'period' is a 'term', 'a cycle', something 'continuous' between a definite beginning and a definite end—whereby, invoking the canon of strict construction in criminal statutes, the period was a period of twelve hours, notwithstanding the intermission.

"We cannot concur in this view. The statute was passed *with custom as a background*. According to custom, nine hours' work unquestionably means nine hours' *actual* employment, whether broken by an intermission for lunch or on account of some other occasion. According to custom, too, especially in railroading in the new western States, the actual service of employees is divided, necessarily divided throughout the day, to correspond with the arrival and departure of trains. Certainly Congress did not intend to override these existing customs; making it necessary either that the railroad company should not not give intermissions, or that the employee should be paid notwithstanding the intermissions; and making it necessary at many stations (presumably well known to Congress) that the railroad should either employ a dif-

ferent telegraph operator for every train that came and went (trains on western roads being often more than nine hours apart), irrespective of the fact that the actual service for each train was a very short period of time. The contention of the Government gives to this word 'period', all things considered, a highly strained meaning. Disregarding a meaning so strained, and reading the word in connection with the context, and *in the light of ordinary custom*, we are clear that the acts proven do not constitute an offense within the meaning of the law. And, if it be objected that under this construction of the law, it would be possible for the railroad company to require its operators to give their service for short period at short intervals, say every alternate hour, or any hour in every two hours and a half, thus so spreading his actual service over the twenty-four hours that no opportunity would be given for real recuperation, the answer is that no instance of such practice has been brought to our attention, and no such instance is likely, which accounts for the fact that no provision in the Act is made for such instances. When such practice actually occurs, Congress will doubtless provide a cure. A further answer is that despatchers, being 'employees', comes under the protection of the main part of the section which gives to all employees 'at least eight consecutive hours off duty' in each day, counting from some point in the next day."

In United States vs. Chicago M. & P. S. Ry. Co. 197 Fed. 625, 626, Judge *Rudkin* said:

"The train in question was what is commonly known as an extra or work train, operating between the stations of Easton and Keechelus, in Kittitas county. The train crew was engaged in picking up logs along the right of way, loading them onto the cars and hauling the loaded cars to Whittier station in Kittitas county, where they were taken up by one of the defendant's regular trains and transported to St. Joe, in the state of Idaho.

"The pay time of the crew commenced at 4:30 a. m., but the crew was not called until 5 a. m. The crew was allowed from 30 to 45 minutes for breakfast, and about 1 hour each for the midday and evening meals. At meal time the crew was relieved from duty and a watchman placed in charge of the train. If the time allowed for meals be deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if these deductions be not made, it was admittedly employed for a longer period than allowed by law."

And again, pages 627, 628, 629, the Court said:—

"Nor should the brief periods allowed for meals be deducted from the time of service, in order to break its continuity. The statute uses the terms, 'sixteen consecutive hours,' and 'continuously on duty'; and while, literally speaking, 'consecutive' means succeeding one another in regular order, *with no interval or break*, and the word 'continuously' means substantially the same, *yet it is manifest that no such strict or literal meaning of these expressions was intended.*

"I cannot believe that by the expressions, 'sixteen consecutive hours', and 'continuously on duty', Congress intended to include only those who are employed for 16 hours, without interruption for meals or otherwise. Congress was no doubt mindful of the fact that no laboring man works for 16 consecutive hours, or is on duty continuously for that period, without food or drink, except in cases of dire necessity, and the act should not be so restricted. It may be said that trainmen are on duty and subject to call during meal hours, but this is only because such is the will of their employers. If a railroad company may relieve its employes from service during meal hours, it may also relieve them from service every time a freight train is tied up on a side track waiting for another train, and thus defeat the very object the Legislature had in view. The *brief interruptions for meals were 'trifling interruptions'*, in the language of the court in the Atchison Case, supra."

"If the three hours layoff is deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if not so deducted, the time or service exceeded that limited by law. *If this crew had been laid off for a definite period of three hours at a terminal or other place where the crew might rest, such lay-off would no doubt break the continuity of the service.* Atchison Case, supra. But such was not the case here. The crew was laid off for an indefinite period, awaiting the arrival of a delayed engine. They did not know at what moment the train might move,

> and had no place to go except to a bunk house, or remain in the caboose. They chose the latter course. This, in my opinion, was a trifling interruption."

Also: Judge *POPE*, in U. S. vs. Denver & R. G. R. Co. 197 Fed. 629.

In Missouri, K. & T. Ry. Co. vs. United States, 231 U. S. 112, 58 L. Ed., Justice *Holmes* again rendering the Opinion, the Supreme Court cited the decisions of Judges *Rudkin* and *Pope* with apparent approval on these points.

In United States vs. Atchison T. & S. F. Ry. Co. 212 Fed. 1000, Judge *Sawtelle* very fully discusses the meaning of "terminal" as used by railroads and intended by this Act, and on page 1007 says:—

> "It does not appear that the word "terminal" has been judicially defined. According to the usage of railroad men in the United States, as shown by the evidence in this case, each train crew is assigned by the officers of the company to a definite, fixed run, beginning and ending at fixed points or places on its line of railroad; and, in my judgment, *these fixed beginning and ending points of a given run for a given crew are the "terminals" of that run within the meaning of the word "terminal" as used in the proviso in section* 3 of this act. In the usage of railroad men there are different 'runs' for different train crews, and also different runs for different employes on the same train, and the run of an engineer on a passenger train might be different from the run of a

conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminous, and one run or several runs for freight crews may lie between the terminals of the run of a single passenger crew, and each of these runs has its own terminals. *And in applying this act to a given case, regard must be had to the line of service in which the train crew or employes in question were engaged at the time* of the alleged violation of the act, *and to that alone.*

"It follows that Barstow was *not a terminal* for train No. 18, *or for said conductor or brakemen,* and that the defendant *did not violate said act by requiring or permitting the employes* mentioned in the complaint *to be or remain on duty for a longer period* than 16 consecutive hours and *in requiring said train crew to continue on duty to the terminal or end of that run.*"

SECOND:—SECTION 2 OF THIS ACT EXPRESSLY RECOGNIZES THAT THERE MAY BE BREAKS IN THE SIXTEEN CONSECUTIVE HOURS AND IN SERVICE CONTINUOUSLY FOR SIXTEEN HOURS, BY FOLLOWING UP THE USE OF THE WORDS "CONSECUTIVE" AND "CONTINUOUSLY" WITH THE WORDS "SIXTEEN HOURS IN THE AGGREGATE."

Section 2 of the Act provides for not *allowing* the crew member (a) to be or *remain* on duty for a longer period than sixteen *consecutive* hours; and (b) *relieving* him from duty after *continuously* being on duty sixteen hours and allowing *10* con-

secutive hours of rest; and (c) *permitting* him to go *again* on duty *after* having been sixteen hours *in the aggregate* on duty, without having at least *eight* consecutive hours *off* duty; etc.

Now these words: "*in the aggregate*", we insist, disclose an express recognition by Congress in this Act, that the *service on duty* may consist of several *separated* periods of time *on* duty, the *aggregate* of which must not exceed sixteen hours, without allowing *eight consecutive* hours *off* duty; and that, where the member of the train crew has served sixteen hours, without as long a period as eight *consecutive* hours *off duty* intervening, such member cannot resume duty until he has had such eight *consecutive* hours rest; but the sixteen hours on duty may be made up of several periods *on* duty and following several periods *off* duty, provided the periods off duty do not amount to what Justice *Holmes* styled "*trifling interruptions*" of duty, described by Judge *Rudkin* as similar to eating *meals*, *waiting on a sidetrack* for a train to go by, and such like *delays* the periods of which are so uncertain that the crew is really *standing by* and not released.

The *purposes* of this Hours of Service Act were *two:* 1st. For the protection of *the Public*, against the dangers possible where the train crews had been on duty too long a time without (a) any rest, and (b) without sufficient rest; and 2d. For the protection of *the train crews*, against being required to

be on duty too long, (a) for "longer period" than sixteen "*consecutive*" hours, (b) on duty for sixteen hours "*continuously*", and (c) on duty for sixteen hours "*in the aggregate*", without *sufficient* rest.

Therefore, the Act declared, in Section 2, 1st, that no member of the train crew should be required or permitted to remain on duty longer than "sixteen *consecutive*" hours; 2d, that when any such member of the crew had been on duty for sixteen hours "*continuously*" he should not be required or permitted to again go on duty *until* he has had at least *ten* consecutive hours *off* duty; and 3d, that where any such member of the crew had been on duty "*in the aggregate*" for sixteen hours in any 24 hour period, he should not be required or permitted to continue or again go on duty without having had *Eight* consecutive hours *off* duty; the 1st and 2d cases calling for *ten* hours rest in the 24 hours period wherein there was 16 hours consecutive or continuous service; and the 3d case calling for only *Eight* hours rest where the service was *not* 16 consecutive or continuous hours, but was for broken or separated periods "*in the aggregate*" amounting to 16 hours.

Thus, this Act as to periods of service and rest recognizes expressly that because of the *continuous* service for 16 hours or for 16 *consecutive* hours, there should be a *rest* of *ten* consecutive hours; and that, because there might be service *not continuous* for 16 hours but during periods *of service* broken up by periods *of rest*, that these *separated* periods

of service should *not exceed* 16 hours "*in the aggregate*", nor should he go on duty again until he had *Eight* consecutive hours *off* duty; and necessarily then, the Act recognizes that a member of the crew may be *on* duty sixteen hours "*in the aggregate*" as well as for sixteen *consecutive* hours or *continuously* for sixteen hours, by providing that the period of *rest* where the service is continuous or during consecutive hours, must be *ten* consecutive hours, and that the period of *rest* where the *service* is *not* continuous or for 16 consecutive hours, but during separated periods "*in the aggregate*" 16 hours, the period of *rest* need be *only Eight* consecutive hours.

The *Supreme* Court by Mr. Justice *Holmes*, in U. S. vs. A. T. & S. F. (220 U. S. 37, 43, 44, 55 L. Ed. 361, 363), said:—

> "*The government contends that when nine hours have passed from the moment of beginning work, the statute allows no more labor within twenty-four hours from the same time, even though the nine hours have not all of them been spent in work.* According to the government's argument, the operator's nine hours expired at half-past 3 in the afternoon. These questions on the construction of the statute are the only ones that we have to decide.
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> "*We are of opinion that the government's argument can not be sustained*, even if it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting. The antithesis

is between places continuously operated night and day and places operated only during the daytime. * * *

"*A man employed for six hours and then, after an interval for three,* in the same twenty-four, *is not employed for a longer period than nine consecutive hours.*"

Therefore, the *definite* periods of *rest* or release as they are called during *separated* periods of service are recognized by Section 2 of this Act, and are to be deducted from the period of time intervening between the member of the crew commencing on duty and his final release from duty; providing that these periods of break or rest during the service do not amount to what Justice *Holmes* styled "trifling interruptions", and which Judge *Rudkin* described as time while eating meals, waiting on a side track for passing trains, taking water, oil and such like, as in such cases the crew are not in fact released but "standing by" ready for duty.

THIRD:—THE PERIOD OF DELAY IN THIS CASE WAS EXCUSABLE UNDER THE PROVISO CONTAINED IN SECTION 3 OF THIS ACT, AS BEING THE RESULT OF A CAUSE NOT KNOWN AND WHICH COULD NOT HAVE BEEN FORESEEN AT THE TIME THIS TRAIN LEFT ITS STARTING TERMINAL, LORDSBURG.

Section 3 of this Act specifies *four* cases in which the Act *shall not apply:* (a)—Casualty; (b)—Unavoidable accident; (c)—Act of God; and (d)—"Nor *where the delay was the result of a cause not*

known to the carrier or its officer in charge of such employee, *at the time said employee left a terminal, and which could not have been foreseen*".

Therefore, it is clear beyond dispute, that this Act expressly declares that the carrier *shall not be liable* under its provisions *for any delay*, no matter from what such delay may arise, "where the delay was *the result of a cause not known*", etc., "*at the time* said *employee left a terminal*".

Consequently, the carrier is *exempted* from the consequences of *any delay*, no matter from what it may arise, where *the delay* was the result of *a cause not known*, etc., even though such *cause* of delay be neither a casualty, nor an unavoidable accident, nor act of God.

This *delay*, and the *cause* thereof, which the proviso of Section 3 exempts from the provisions of the act, does not mean *only similar* causes of delay, but means *any delay* arising; and this is emphasized by the use of the word "*nor*", not "or", following the *three causes* already *enumerated.* The test is, was the *cause* of the delay known at the time this train left its starting terminal Lordsburg at 6 A. M. or could it have been foreseen; if the *cause* was not known and could not have been foreseen, this delay is excused; and whether it was known or could have been foreseen was a question for the jury, and the Court erred in directing a verdict for the Government and not letting the case go to the jury.

II.

THE EVIDENCE IN THIS CASE PRESENTED QUESTIONS OF MIXED LAW AND FACT SUFFICIENT TO REQUIRE THE COURT TO SUBMIT THE CASE TO THE JURY FOR THEIR VERDICT, AND IT WAS ERROR TO DIRECT A VERDICT FOR THE GOVERNMENT.

In United States vs. Northern Pacific R. Co. 213 Fed. 539, 540, 541, Judge Rudkin said:—

> "Perhaps it *cannot* be said *as a matter of law* in all cases whether a *release from duty for a fixed period of time* will or will not be sufficient to break the continuity of the service. No doubt *in extreme cases the court may declare as a matter of law* that a given period is so short as not to break the continuity of the service, or that another period is so long as to break the continuity of the service, *but between these extremes there is a twilight zone, where the question becomes a mixed one of law and fact.*"

In Phoenix Mutual Life Insurance Company vs. Doster, 106 U. S. 30, 27 L. Ed. 65, the Supreme Court held the rule to be, that *a directed verdict* can only be granted upon the theory that upon *no legally possible view* of the evidence could a contrary verdict stand.

> Texas & Pac. R. Co. vs. Cox, 145, U. S. 593, 36 L. Ed. 829;
> Empire State Cattle Co. vs. Atchison T. & A. C., 210 U. S. 1, 8, 52 L. Ed. 931, 936.

The evidence in this case was the undisputed testimony of the train crew and the dispatcher with the evidence contained in the records of the Company relating to this particular *local freight* train and its mishaps, from terminal to terminal—Lordsburg to Benson; and this evidence showed that it *became necessary*, after the train had left Lordsburg at 6 A. M. to detain it on its arrival at Bowie for not less than 2 hours and 25 minutes, to detach the Engine and send it to help another train up the hill from San Simon to Steins (Tr. p. 39, 40); and at Bowie the Conductor and trainmen were *relieved from duty* from 9:15 to 11:40 A. M., while the Engineer and Fireman were so employed with their Engine; the Engine returned to Bowie at 1:30 P. M. and the Engineer and Fireman and the Conductor and Trainmen were again *relieved from duty* for the period from 1:30 to 2:30 P. M. on account of being blocked by other intervening trains and switching operations caused by the delay at Bowie (Tr. p. 65, 66). The entire crew lived in Benson (p. 44).

Thus there was a period of 3 hours and 25 minutes during which this train crew (Conductor and Trainmen; 1 hour for the Engineer and Fireman, the Engineer and Firemen were finally relieved at Cochise) were *relieved from duty* at Bowie, because of the necessity of detaching their Engine at Bowie to help another train up a hill, this *delay* being the result of a cause not known and which could not have been foreseen at the time this train

and crew left its Lordsburg terminal, and therefore the *delay* was excused under the *proviso* in Section 3 of the Act; and this period *of delay* was also to be *deducted* from the 16 hour period, because that Crew had been *relieved from duty* during the period of the delay and *were resting*, and such relief from duty under the circumstances did break the continuity of the service within the meaning of the law.

Upon the Motion to direct a verdict, all of the evidence must be given its full weight in favor of the opposite party, in this case, in favor of the Plaintiff in Error, together with all inferences legally deducible from the evidence; and unless the Court would have been compelled to set aside a verdict in favor of the Plaintiff in Error as contrary to and not supported by the evidence, the Court should have submitted the case for their verdict to the jury.

The Government insists however, that we are not entitled to have the evidence reviewed by this Court, after the Order of the District Court directing a verdict, because the Government and the Defendant *both* moved the Court *for a directed* verdict, citing:—

> *Buetell vs. Magone*, 157 U. S. 154, 39 L. Ed. 654;

The Supreme Court, by Mr. Justice *White*, said, in that case:—

"The contention is advanced that as each party below requested the Court to instruct the jury to return a verdict in his favor, this was equivalent to a stipulation waiving a jury and submitting the case to decision of the court. From this premise two conclusions are deduced, first, that, there being no written stipulation, the decision below cannot be reviewed upon writ of error; second, that, even if the request in open court, made by both parties, be treated as a written stipulation, the correctness of the decision below cannot be examined, because it is in the form of a general finding on the whole case, and findings of the court upon the evidence are reviewable only when they are special.

"The request, made to the court by each party to instruct the jury to render a verdict in his favor was *not equivalent to a submission of the case to the court, without the intervention of a jury*, within the intendment of sections 649, 700, Revised Statutes. As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to consideration of the correctness of the finding on the law, and must affirm if there by any evidence in support thereof. Lehnen v. Dickson,

148 U. S. 71 (37: 373); Runkle v. Burnham, 153 U. S. 216 (38: 694)."

But the Defendant in this case *did not* consent or stipulate or by its motion agree, to submit the case to the Court, as the Government's motion *did*. The *record* shows as follows:—

"Thereupon, and before the Court charged the jury and before argument, plaintiff moved the Court that it direct the jury to return a verdict in its favor upon the first and second causes of action set forth in the complaint, and that the court direct the jury to return a verdict in its favor upon the third, fourth, fifth, and sixth causes of action set forth in the complaint.

"Thereupon, and before argument and before the Court charged the jury, defendant, by its counsel moved the Court to direct the jury to return a verdict in its favor upon the first, second, third, fourth, fifth and sixth causes of action as set forth in the complaint, *and that in case said motion be denied that it have leave to go to the jury.*

"Thereupon, after argument by the respective counsel in the absence of the jury the Court granted plaintiff's said motion for a directed verdict in favor of plaintiff upon the first, second, third, fourth, fifth and sixth causes of action, *and denied defendant's motion* for a directed verdict in favor of defendant on the said first, second, third, fourth, fifth and sixth causes of action *and for leave to go to the jury.*

"Defendant then and there and before the Court charged the jury duly *excepted to the*

> *ruling* of the Court in granting plaintiff's said motion for a directed verdict in favor of plaintiff, and duly excepted to the ruling of the Court in *denying defendant's* said *motion* for a directed verdict in its favor and *for leave to go to the jury* in case said motion be denied." (Tr. p. 58, 59).

The Defendant, in its request, expressly moved "the Court to direct the jury to return a verdict in its favor * * * *and that in case said motion be denied that it have leave to go to the jury*" (Tr. p. 59), and expressly "*excepted* to the ruling denying said Motion * * * *and for leave to go to the jury in case* said Motion be denied". (Tr. p. 59).

Now, in *Empire State Cattle Co. vs. Atchison, T. & S. F.*, 210 U. S. 1, 8-9, 52 L. Ed. 931, 936-937, the same learned Justice *WHITE*, clearly explained his former ruling as follows:—

> "If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the cause to the court, despite the fact that the plaintiffs asked special instructions upon the effect of the evidence, then, as said in Beuttell v. Magone, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566, 'the facts having been thus submitted to the court, we are limited, in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof.' *If, on the other hand*, it be that, *although the plaintiffs had*

requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then our inquiry has a wider scope; that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness, or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in Beuttell v. Magone, supra, that *where both parties request a peremptory* instruction *and do nothing more*, they thereby assume the facts to be undisputed, and, in effect, submit to the trial judge the determination of the inferences proper to be drawn from them. *But nothing in that ruling sustains the view* that a party may not request a peremptory instruction, *and yet, upon the refusal of the court to give it, insist*, by appropriate requests, *upon the submission of the case to the jury*, where the evidence is conflicting, *or the inferences to be drawn from the testimony are divergent.* To hold the contrary would unduly extend the doctrine of Beuttell v. Magone, by causing it to embrace a case not within the ruling in that case made. The *distinction* between a case like the one before us and that which was under consideration in Beuttell v. Magone has been pointed out in several recent decisions of circuit courts of appeals. It was *accurately noted* in an opinion delivered by Circuit Judge Severens, speaking for the circuit court of appeals of the sixth circuit, in Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed. 37, 41, and

was also *lucidly stated* in the concurring opinion of Shelby, Circuit Judge, in McCormack v. National City Bank, 73 C. C. A. 350, 142 Fed. 132, where, referring to Beuttell v. Magone, he said (p. 351):

"'*A party may believe* that a certain fact which is proved without conflict or dispute entitles him to a verdict. *But there may be evidence* of other, but controverted, facts, which, *if proved to the satisfaction of the jury*, entitles him to a verdict, regardless of the evidence on which he relies in the first place. *It cannot be* that the practice *would not* permit him to ask for peremptory instructions, and, if the court refuses, *to then ask for instructions submitting the other question to the jury*. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in Beuttell v. Magone, supra, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

"'In New York there are many cases showing conformity to the practice announced in Beuttell v. Magone, but they *clearly recognize the right* of a party who has asked for peremptory instructions *to go to the jury* on controverted questions of facts *if he asks* the court to submit such questions to the jury. Kirtz v. Peck, 113 N. Y. 226, 21 N. E. 130; Sutter v. Vanderveer, 122 N. Y. 652, 25 N. E. 907.

"'The fact that each party asks for a peremptory instruction to find in his favor *does not submit* the issues of fact to the court, so

as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, *nor does it deprive him of the right* to have questions of fact *submitted to the jury* if issues are joined on which conflicting evidence has been offered. Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed. 37.'

"From this *it follows that the action of the trial court* in giving the peremptory instruction to return a verdict for the railway company *cannot be sustained merely* because of the request made by both parties for a peremptory instruction, in view of the special requests asked on behalf of the plaintiffs. *The correctness*, therefore, of the action of the court in giving the peremptory instruction *depends not upon the mere requests* which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff. McGuire v. Blount, 199 U. S. 142, 148, 50 L. ed. 125, 130, 26 Sup. Ct. Rep. 1, and cases cited; Marande v. Texas & P. R. Co. 184 U. S. 191, 46 L. ed. 495, 22 Sup. Ct. Rep. 340, and cases cited; Southern P. Co. v. Pool, 160 U. S. 440, 40 L. ed. 486, 16 Sup. Ct. Rep. 338, and cases cited.

> "To dispose of this question requires us to consider somewhat in detail the origin of the controversy, the contracts of shipment from which the controversy arose, and *the proof* which is embodied in the bill of exceptions relied on *to justify the inference* of liability on the part of the railway company."

Therefore, the Defendant did *not* request the Court to find the facts, but asked to go to the Jury if its request for a directed verdict should be denied; and the request for a directed verdict by the Defendant coupled as it was with the request to go to the jury in case such request should be denied by the Court, did not, within the fair explanation by Justice White in 210 U. S. 1, 8, 9, of his former decision in 157 U. S. 154, constitute a consent that the Court should find the facts, or prevent Defendant now having the evidence reviewed here.

Now, in this case, the Government contends that these *two releases* from duty were not releases for *definite* periods, but that the members of the crew were subject to be called to duty at any minute; the Government also claims that the period of *delay* could have been foreseen, and that there were *terminals* within this Act between Lordsburg and Benson at which this crew could and should have been relieved from duty so that their time of service would not exceed 16 hours; also, the Government questions whether *any releases for definite* periods were given this crew, and insists that such releases were mere "*trifling interruptions*" and did *not*

break the continuity of their service. These questions and all of the inferences legally deducible from the evidence were questions *for the jury* and not for the Court, and the Court erred in directing the verdict for the Government.

III.

The *entire evidence* in this case was introduced *by the Government*, and conclusively establishes that this train crew were not permitted or required to be or remain on duty exceeding *16 hours in the aggregate*, as allowed by Section 2 of this act.

It is respectfully submitted, the judgment as to these *last six* Counts in the Complaint should be reversed with directions to enter judgment for Defendant.

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